

IN THE FIRST CIRCUIT COURT FOR DAVIDSON COUNTY
TWENTIETH JUDICIAL DISTRICT AT NASHVILLE

FILED

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STATE OF TENNESSEE)
ex rel. ROBERT E. COOPER, JR.,)
ATTORNEY GENERAL & REPORTER,)

Plaintiff,)

v.)

AIRBORNE HEALTH, INC., *doing business as*)
AIRBORNE and AIRBORNE, INC., *formerly*)
doing business as KNIGHT-MCDOWELL)
LABS, AIRBORNE HOLDINGS, INC.,)
VICTORIA KNIGHT-MCDOWELL, and)
and THOMAS JOHN MCDOWELL,)

Defendants.)

RICHARD R. HUGHES

R. Hughes

Case No. 08C-4142

COMPLAINT

1. This civil law enforcement proceeding is brought in the name of the State of Tennessee, by and through Robert E. Cooper, Jr., Attorney General and Reporter, pursuant to the Tennessee Consumer Protection Act of 1977 (Tenn. Code Ann. § 47-18-101 *et seq.*) (hereinafter "TCPA"), the Attorney General's general statutory authority (Tenn. Code Ann. § 8-6-109), and the Attorney General's authority at common law, at the request of Mary Clement, the Director of the Division of Consumer Affairs of the Department of Commerce and Insurance.

2. The Attorney General and the Director have reason to believe that the above-named Defendants have violated the TCPA by, among other things, failing to substantiate health claims associated with their line of dietary supplements.

3. This Complaint is being filed concurrently with an Agreed Final Judgment. The Defendants have cooperated in the State's investigation and have waived the requirement of ten days of notice of contemplated legal action as set forth in Tenn. Code Ann. § 47-18-108(a)(2).

JURISDICTION AND VENUE

4. This Court exercises jurisdiction pursuant to Tenn. Code Ann. § 47-18-108 and Tenn. Code Ann. § 47-18-114. Venue is proper in Davidson County pursuant to Tenn. Code Ann. § 47-18-108(a)(3) as it is where the alleged unfair and deceptive practices have taken place and is where the Defendants have transacted business.

THE PARTIES

5. Plaintiff, State of Tennessee *ex rel.* Robert E. Cooper, Attorney General and Reporter, is charged with enforcing the Tennessee Consumer Protection Act of 1977, Tenn. Code Ann. § 47-18-101 *et seq.*, which prohibits unfair or deceptive acts or practices affecting the conduct of trade or commerce. Pursuant to Tenn. Code Ann. § 47-18-108(a)(1), the Attorney General may initiate civil law enforcement proceedings in the name of the State to stop violations of the TCPA and to secure such equitable and other relief as may be appropriate in each case. The State of Tennessee brings this action to secure a permanent injunction, civil penalties, and other equitable relief against the Defendants for engaging in unfair and deceptive acts or practices in connection with the advertising, marketing, and sale of their line of dietary supplements.

6. Defendant Airborne Health, Inc., also doing business as Airborne and Airborne, Inc. and formerly doing business as Knight-McDowell Labs, is a Delaware corporation with its principal place of business at 26811 South Bay Drive, Suite 300, Bonita Springs, FL 34134. Airborne Health also has another office located at 100 Clock Tower, Suite 120, Carmel, CA 93923. Since 2005, Airborne Health has, alone or acting in concert with others, manufactured, marketed, distributed and sold Airborne Products to consumers throughout the United States.

7. Defendant Airborne Holdings, Inc., is a Delaware corporation with its principal place of business at 26811 South Bay Drive, Suite 300, Bonita Springs, FL 34134. Airborne

Holdings is the sole owner of Airborne Health. In May 2005, Summit Partners, a venture capital firm based in Boston, acquired Airborne from Victoria Knight-McDowell and Thomas John McDowell, Airborne's original founders. During this acquisition, Airborne Acquisition Company, a California corporation and wholly owned subsidiary of Airborne Holdings, Inc., merged with and into Airborne, Inc. which also did business under the name Knight-McDowell Labs, a California corporation with its principal place of business in Carmel, California. Through the merger, Airborne Holdings became the parent company of Airborne, Inc. In December 2005, Airborne Holdings merged Airborne, Inc. with and into Airborne Health, Inc., which has continued to use the name "Airborne, Inc." as a business name. In the fall of 2008, Individual Defendants Victoria Knight-McDowell and Thomas John McDowell reacquired Airborne Holdings and are currently majority shareholders of the company. Since May 2005, acting alone or in concert with others, Airborne Holdings has marketed, distributed, and sold Airborne Products to consumers throughout Tennessee or has caused the Airborne Products to be marketed, distributed, and sold to consumers throughout Tennessee.

8. Defendant Victoria Knight-McDowell, sued individually, is purportedly the creator of Airborne Health Formula and is the former co-owner, President, and Secretary of Airborne, Inc. She currently resides in Pacific Grove, CA, and is currently a majority owner and board member of Airborne Holdings along with Mr. McDowell and others. Prior to May 2005, Defendant Knight-McDowell acting alone or in concert with others directed, formulated, controlled, or participated in the policies, acts, or practices as set forth herein.

9. Defendant Thomas John McDowell, also known as "Rider" McDowell, sued individually, is Defendant Knight-McDowell's husband. Defendant McDowell also currently resides in Pacific Grove, CA, and together with Mrs. Knight-McDowell is a majority owner of

Airborne Holdings. Prior to May 2005, Defendant Thomas John McDowell acting alone or in concert with others has directed, formulated, controlled, or participated in the policies, acts, or practices as set forth herein.

GENERAL ALLEGATIONS

Upon information and belief, the State of Tennessee alleges as follows:

10. The Defendants have made health-related claims in the marketing, packaging, advertising, offering, and selling of their line of dietary supplements that were not substantiated by reliable and competent scientific evidence at the time the claims were made. Specifically, the Defendants have explicitly or implicitly claimed to sell a cold prevention remedy, a sore throat remedy, a germ fighter, and an allergy remedy without adequate substantiation to prove that the products could perform as advertised at the time the claims were made. The State also alleges that the Defendants failed to adequately warn consumers about potential health risks to select populations, including pregnant women, at the time that Airborne contained 5,000 International Unit of Vitamin A per dose under prior formulations. Currently, the level of Vitamin A in Airborne is 2,000 International Units. Under the current directions for use, consumers are directed not to take beyond three doses a day.

11. Airborne Effervescent Health Formula (“Airborne Original”) is a dietary supplement containing seventeen herbs and nutrients. Airborne Original is the Defendants’ most successful product and has been the number one selling item in the cough and cold section of major retailers within the last two years. Aside from a modest proprietary blend, Airborne consists of Vitamin A, Vitamin C, Vitamin E, Riboflavin, Magnesium, Selenium, Manganese, Potassium, and Amino Acids. Airborne Original is a citrus-flavored effervescent tablet sold in plastic tubes of ten tablets. The directions for Airborne Original instruct the consumer to let the tablet dissolve in

a glass of water before drinking it. Airborne Original is also currently sold in lemon-lime and pink grapefruit flavors.

12. Under the control of Airborne Holdings, Airborne Health has expanded the Airborne brand to include several additional lines of products sold as dietary supplements. Additional Airborne products include Airborne, Jr., a grape flavored effervescent tablet for use by children ages four to ten containing half the dosage of the herbs and nutrients found in Airborne Original, Airborne Nighttime, an apple cider flavored effervescent tablet based on the same formula as Airborne Original, Airborne On-the-Go, a lemon-lime flavored powder that is supposed to be poured directly into a water bottle, Airborne Power Pixies, a cherry flavored powder similar in form to the candy Pixie Stix that is supposed to be poured directly onto the tongue by children between ages four and twelve, Airborne Gummi Lozenges (formerly Airborne Sore Throat Gummi Lozenges), a gelatin-based lozenge that is designed to be dissolved in the mouth, and Airborne Seasonal Relief, a citrus flavored tablet that contains Vitamin C, Vitamin B6, Pantothenic Acid, Sodium and a proprietary blend of herbal extracts that purports to “promote normal histamine levels.”

13. Airborne products can be found in the cough/cold aisle of most retail stores including Walgreens, CVS, Kroger, Albertson’s, Target, Wal-Mart, Sam’s Club, Trader Joe’s, and Costco, as well as online at www.airbornehealth.com and through third party Internet retailers.

SPECIFIC FACTUAL ALLEGATIONS

14. Since 1997 and continuing thereafter, the Defendants have individually or in concert with others, manufactured, marketed, advertised, promoted, offered for sale, sold, and distributed Airborne Original to the public.

15. National distribution of Airborne Original began on or around 2000.

16. The Defendants have used both traditional (radio, television, print, Internet) and non-traditional (promotions with Airlines and celebrities) media to induce consumers to buy Airborne Original, and other Airborne Products.

17. The Defendants have generally run their marketing campaigns from October to February with the greatest spending taking place during November through January, the peak of cold, flu, and cough season.

18. The Defendants, alone or in concert with others, have intentionally positioned and marketed Airborne Original and all other Airborne products with the exception of Airborne Seasonal Relief as a preventative cold remedy. Until recently, the Defendants also marketed most of their product line as being able to fight germs in crowded areas such as airplanes, restaurants, offices, hospitals, schools, health clubs, carpools, theaters, and sports arenas.

19. The Defendants specifically referred to Airborne Original as a cold remedy by making the following claims, primarily on their website;

- (a) "Airborne Effervescent Cold Formula;"
- (b) "A Miracle Cold Buster;"
- (c) "Airborne Cold Remedy;"
- (d) "Sick of Catching Colds? Try Airborne;"
- (e) "Airborne Natural Cold Remedy;"
- (f) "Developed by a school teacher who was sick of catching colds in class and on airplanes!;"
- (g) "Developed by a school teacher who was sick of catching colds in class!;"
- (h) "I created Airborne because, as a teacher dealing with young children, I was sick of catching colds in the classroom;"



"A Miracle Cold Buster!"
-Carme Grieco, Northbrook, IL

(i) “Take at the first sign of a cold symptom or before entering crowded, potentially germ-infested places!;”

(j) “Take at the first sign of a cold symptom or before entering crowded environments;”

(k) “Airborne has become one of the fastest selling health products in retail history – largely by word of mouth—and the #1 selling natural product in the busy cough/cold aisle of all major drug stores;” and

(l) “Look in the cough-cold aisle of your favorite drug store.”



20. The Defendants asked consumers whether they were “Sick of Catching Colds?” on



their previous prior packaging and elsewhere.

21. The Defendants have also made health claims through vignettes of cartoon figures sneezing, coughing, or with other cold and cough indicators on their product packaging and on their marketing materials.



22. The Defendants have also made health claims about their products purported germ fighting abilities throughout. The Defendants, until recently, have featured cartoon and other depictions of germs.



23. In 2004, the Defendants launched a series of national television ads with celebrities including Barry Williams, the actor who played Greg Brady on the Brady Bunch. The Defendants posted these advertisements on their website.

24. In one of the ads, Barry Williams' character screams each time someone sneezes, coughs or snuffles audibly. The advertisement's tagline states, "Created by a teacher who was sick of catching colds in class." The product shot near the end of the advertisement states across the top of the packaging in a red banner "Sick of Catching Colds?"

25. As part of the same advertising campaign, the Defendants created several promotional photos for use by the press, which were posted on Airborne's website. In a promotional photo featuring Barry Williams, he is pictured with boxing gloves alongside Victoria Knight-McDowell and two individuals dressed up as cold germs.



26. In another promotional photograph, Defendant Knight-McDowell stands next to actor Mickey Rooney and the same two individuals dressed as cold germs. Mr. Rooney's shirt reads "Airborne Natural Cold Remedy."



27. In late 2005, the Corporate Defendants purchased advertisements on Howard Stern's radio program. Mr. Stern on several occasions made explicit claims about Airborne's purported cold prevention properties. As an example, Mr. Stern stated, "Airborne Health Formula – whenever I start to feel like I have a cold or feel I'm getting run down . . ."

28. In 2006, the Corporate Defendants launched an advertising campaign chiefly for their Airborne Original product that featured a man dressed as a giant germ sneezing on people, coughing on people, and engaging in other unsanitary acts. During this campaign, the Defendants used the tagline “Germs are everywhere? Have you taken your Airborne?”

29. While the written claims in the 2006 advertising campaign were confined largely to Airborne’s purported ability to “fight germs,” a claim that the State alleges Airborne also lacked substantiation to make, the visual representations contained in the advertisements still stressed cold and cough symptom indicators.



30. After the first acquisition of the company, the Corporate Defendants expanded their product line. As part of this expansion, the Corporate Defendants launched a series of new products, including “Airborne Sore Throat Gummi Lozenge.”



31. As part of the expanded product line, the Corporate Defendants launched a “Seasonal Relief” product that made implicit unsubstantiated “allergy relief” claims. The marketing campaign for the “Seasonal Relief” product ran during the peak of allergy season and featured individuals in the outdoors sneezing.



32. In November 2006, Defendants Airborne Holdings and Airborne Health purchased advertising space with “The Weather Channel” for a segment on nationwide influenza reports. The segment featured the Airborne logo and domain name www.airbornehealth.com on screen with a nationwide map depicting influenza reports from the CDC. The feature also depicted a woman blowing her nose into a tissue. The narrator for the spot states, “Have you taken your Airborne? It’s the immune-boosting formula that helps your body fight germs and viruses.”

33. In another example, Defendants Airborne Holdings and Airborne Health purchased a banner advertisement on a Yahoo! Health web page concerning the cold and flu season that also listed hyper links to the words “Treatments” and “Medications.”

34. At no point did Airborne possess adequate substantiation for their cold prevention, cold treatment, fights germs, sore throat, or allergy relief claims.

35. The Defendants made claims in their advertisements and other marketing materials including their cold prevention, cold treatment, sore throat, and allergy treatment claims purporting to prevent, treat, or cure disease without lawfully obtaining approval to make such claims.

36. Aside from failing to substantiate, the Defendants also failed to clearly and conspicuously disclose material facts concerning their product.

37. Prior formulations of Airborne contained 5,000 International Units of Vitamin A. Currently, the highest dosage of Vitamin A for any Airborne product is 2,000 International Units with directions advising consumers not to exceed three tablets per day.

38. Vitamin A, unlike Vitamin C, is retained longer in the body. Excessive Vitamin A can be toxic to the body at certain levels. While the scientific literature is not completely uniform, with some studies placing the toxicity levels of Vitamin A at 100,000 International Units of Vitamin A, other studies place the toxicity levels of Vitamin A at much lower amounts, particularly for pregnant women and children.

39. Early versions of Airborne's product packaging did not contain any limitations on the maximum number of doses of Airborne per day, which combined with Airborne's marketing strategy encouraging preventative use likely caused consumers to ingest high levels of Vitamin A – especially when one accounts for the Vitamin A consumers receive from other sources. Subsequent versions of Airborne's product packaging advised consumers not to take more than three tablets per day. While every packaging version of Airborne contain a statement along the lines of, "As with all dietary supplements, pregnant women should consult a physician before taking," this statement was not clearly and conspicuously disclosed.

VIOLATIONS OF LAW

COUNT 1: TENNESSEE CONSUMER PROTECTION ACT

40. The State incorporates by reference and realleges each allegation contained in paragraph 1-39.

41. All of the acts and practices engaged in and employed by the Defendants as alleged herein, are unfair or deceptive acts or practices affecting the conduct of any trade or commerce in Tennessee, which are declared unlawful by Tenn. Code Ann. § 47-18-104(a).

42. By making health or other claims without competent and reliable scientific evidence to substantiate them, the Defendants have violated Tenn. Code Ann. § 47-18-104(a), (b)(5), (b)(22), and (b)(27) with each representation.

43. By making health claims in their advertisements claiming to prevent, treat, or cure disease that were unlawful because Defendants failed to obtain advance approval for such claims, the Defendants have violated Tenn. Code Ann. § 47-18-104(a), (b)(2), (b)(3), (b)(5), (b)(22), (b)(27), and (b)(44)(C).

44. By failing to clearly and conspicuously disclose the potential harm posed to consumers who ingested excessive levels of Vitamin A during the time under prior formulations of Airborne that contained 5,000 International Units of Vitamin A, the Defendants have violated Tenn. Code Ann. § 47-18-104(a) and (b)(27).

PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, Plaintiff, State of Tennessee, *ex rel.* Robert E. Cooper, Jr., Attorney General and Reporter, pursuant to the Tennessee Consumer Protection Act of 1977, the Attorney General's general statutory authority, the Attorney General's authority at common law and this Court's equitable powers, prays:

1. That this Complaint be filed without cost bond as provided by Tenn. Code Ann. §§ 20-13-101 and 47-18-116.

2. That this Court adjudge and decree that the Defendants have engaged in the aforementioned acts or practices which violate the Tennessee Consumer Protection Act of 1977.

3. That pursuant to Tenn. Code Ann. § 47-18-108(a)(1), (a)(4), (a)(5), this Court permanently enjoin and restrain the Defendants from engaging in the aforementioned acts or practices which violate the Tennessee Consumer Protection Act of 1977, and other laws and regulations.

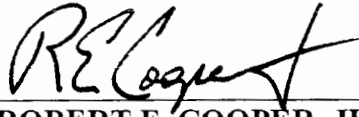
4. That this Court enter judgment against the Defendants and in favor of the State for the reasonable costs and expenses of the investigation and prosecution of the Defendants' actions, including attorneys' fees and costs, expert and other witness fees, as provided by Tenn. Code Ann. § 47-18-108(a)(5) and (b)(4), and other state law.

5. That this Court adjudge and decree that the Defendants pay civil penalties of not more than one thousand dollars (\$1,000.00) for each and every violation of the Tennessee Consumer Protection Act of 1977 to the State of Tennessee as provided by Tenn. Code Ann. § 47-18-108(b)(3).

6. That all costs in this case be taxed against the Defendants.

7. That this Court grant the State such other and further relief as this Court deems just and proper.

Respectfully submitted,



ROBERT E. COOPER, JR., B.P.R. No. 10934
Attorney General and Reporter



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Attorneys for the State of Tennessee

I hereby certify that this is a true copy
of original instrument filed in my office
this 16th day of Dec 2008
By R Thomas
Deputy Clerk

APPROVED BY:

A handwritten signature in black ink, reading "Mary Clement". The signature is written in a cursive style with a large, sweeping flourish over the word "Clement".

Mary Clement

Director

Division of Consumer Affairs